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No. 80-2165

In The

Supreme Court of the United States

October Term, 1980

JAMES M. MURPHY, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

vs.

EUGENE L. HUNT,

Appellee.

On Appeal from the United States Court of Appeals for the Eighth Circuit

APPELLANT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the excessive bail clause of the Eighth Amendment to the United States Constitution is applicable to the states through the Fourteenth Amendment to the United States Constitution.

2. Whether the 1978 amendment to the bail clause of Article I, Section 9, of the Nebraska Constitution violates the excessive bail prohibition of the Eighth Amendment to the Constitution of the United States.

3. Whether the 1978 amendment to the bail clause of Article I, Section 9, of the Nebraska Constitution violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

4. Whether the 1978 amendment to the bail clause of Article I, Section 9, of the Nebraska Constitution violates any presumption of innocence protected by the due process clause of the Fourteenth Amendment or the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States or violates the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution.

5. Whether the people of the State of Nebraska through their Constitution can, without violating any of the provisions of the United States Constitution, deny bail to a class of persons where the proof of their guilt is evident or the presumption of their guilt great where this class of persons has been determined to pose a significant danger to the community.

LIST OF PARTIES

The caption of this case contains the names of all parties.

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APPELLANT'S BRIEF ON THE MERITS

OPINIONS BELOW

The decision in the combined cases of *Eugene L. Hunt v. Richard Roth, etc.*, and *Eugene L. Hunt v. James M. Murphy* was filed by the United States Court of Appeals for the Eighth Circuit on May 13, 1981, and is reported at 648 F. 2d 1148 and appears as Exhibit A in the appellant's jurisdictional statement.

The decision in the combined cases of *Eugene L. Hunt v. Richard Roth, etc.*, and *Eugene L. Hunt v. James M.*

Murphy was filed by the United States District Court for the District of Nebraska on October 17, 1980. This decision is unreported and can be found as Appendix B in the appellant's jurisdictional statement.

JURISDICTION

This is an appeal from a finding by the United States Court of Appeals for the Eighth Circuit that Article I, Section 9, of the Constitution of the State of Nebraska is in part violative of the Eighth and Fourteenth Amendments to the United States Constitution. This finding was filed by the United States Court of Appeals for the Eighth Circuit on May 13, 1981. This case is a civil rights action brought pursuant to 42 U. S. C. § 1983. This Court's jurisdiction over this case is derived from 28 U. S. C. § 1254 (2). A copy of the notice of appeal filed in the United States Court of Appeals for the Eighth Circuit can be found as Appendix C in appellant's jurisdictional statement. This Court noted probable jurisdiction on October 5, 1981.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. Section 1, Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

3. Article I, Section 9, of the Constitution of the State of Nebraska:

> All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

4. Article I, Section 9, of the Constitution of the State of Nebraska can be found in Volume 2 of the Revised Statutes of Nebraska (Reissue 1979) on page 62.

STATEMENT OF THE CASE

In November of 1978 the people of the State of Nebraska by a direct popular vote of 356,000 in favor to 80,000 against, amended Article I, Section 9, of the Constitution of the State of Nebraska so as to provide:

> All persons shall be bailable by sufficient sureties, except for treason, *sexual offenses involving pen-*

> *etration by force or against the will of the victim,* and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Neb. Const., Art. I, § 9 (language added by amendment emphasized).

Subsequent to the passage of the constitutional amendment set out above, Eugene Hunt was charged in the District Court of Douglas County, Nebraska, with multiple counts of forcible first degree sexual assault. For purposes of bail consideration only, Mr. Hunt while represented by counsel stipulated that the proof was evident and the presumption was great and the Douglas County District Court, the Honorable James M. Murphy presiding, one of the parties herein, denied bail.

Thereafter, Mr. Hunt sought habeas corpus relief in the United States District Court for the District of Nebraska and filed a civil rights action against Judge Murphy, seeking certain declaratory relief. The United States District Court for the District of Nebraska denied all requested relief and an appeal was taken to the United States Court of Appeals for the Eighth Circuit. The United States Court of Appeals for the Eighth Circuit granted Mr. Hunt's declaratory relief sought pursuant to the Civil Rights Act and denied the habeas corpus relief sought on the basis of mootness. The United States District Court for the District of Nebraska did not require Mr. Hunt to seek relief in the Supreme Court of the State of Nebraska inasmuch as identical issues had been raised in a previous case, *Parker v. Roth,* 202 Neb. 850, 278 N. W.

2d 106 (1979), *cert. denied*, 444 U. S. 920, 62 L. Ed. 2d 177, 100 S. Ct. 1072 (1979).

Of the four charges under which Mr. Hunt was denied bail pursuant to Article I, Section 9, of the Constitution of the State of Nebraska, he was convicted of three and acquitted of one. On the charge of first degree sexual assault on a child, Mr. Hunt was sentenced to 12 to 15 years imprisonment on December 11, 1980, and thereafter filed a direct appeal to the Nebraska Supreme Court which is now pending under Case No. 43955.

On the two charges of first degree forcible sexual assault, Mr. Hunt was sentenced on November 5, 1980, to consecutive terms of 8 to 15 years imprisonment and thereafter filed a direct appeal to the Nebraska Supreme Court where it is now pending under Case No. 43885.

SUMMARY OF ARGUMENT

1. A state constitution is the fundamental and organic law of a state and reflects the direct expression of the attitude of the people of that state toward the functioning of their state political system. A federal court should accept the interpretation given a state's constitution by that state's highest court and should only declare that state's constitution in contravention of the Federal Constitution where the impediment is clear and free from all doubt.

2. While it is conceded for the sake of argument that the literal language of the Eighth Amendment is no doubt

applicable to the states through the Fourteenth Amendment, it is argued that the Eighth Amendment creates no absolute or fundamental right to bail and thus nothing more than the literal right expressed is applicable to the states through the Fourteenth Amendment.

3. The Eighth Amendment to the United States Constitution does not create a fundamental right to bail; rather, it only provides that bail shall not be excessive in those cases where it is otherwise proper to grant bail. The plain and simple language of the Eighth Amendment mandates such a conclusion as does a review of the historical background of the enactment of the amendment and an analysis of the precedent involving its interpretation.

4. The right to bail is not a fundamental right nor an absolute right and since the classification created bears a rational relationship to the object sought to be achieved and is reasonable, it is therefore not violative of the Fourteenth Amendment. The people of the State of Nebraska have directly determined that persons charged with sexual offenses involving penetration by force where the proof of their guilt is evident or the presumption of their guilt great constitute a distinct class of persons whose pretrial release could cause a severe and significant danger.

5. Article I, Section 9, does not create an irrebuttal presumption that every person charged with a sexual offense involving force poses a significant danger but merely denies them the constitutional right to demand bail, the state judge being given the discretion to determine whether the proof is evident or the presumption great or to grant

bail even if he so finds. Article I, Section 9, denies a person so accused a constitutional right to bail—it does not prohibit his release on bond.

6. States have historically, without violating the United States Constitution, denied bail where it was feared that to do so would lessen the likelihood that the accused would reappear for trial and a state may also constitutionally deny bail where it is feared that an individual's release on bail will pose a serious and substantial threat to the safety of the citizens of that state.

7. Article I, Section 9, of the Nebraska Constitution does not violate the presumption of innocence, the right to effective assistance of counsel, nor does it constitute cruel and unusual punishment.

ARGUMENT

I.

A state constitution represents the will of the people and a provision thereof should not be found to contravene the Federal Constitution unless a constitutional impediment is clearly shown to exist.

The constitution of a state is the fundamental and organic law of a state. *See, e. g., Ware v. Hylton,* 3 Dall. 199, 1 L. Ed. 568 (1796); *McCulloch v. Maryland,* 17 U. S. 316 (1819). It represents the direct and basic expression of the sovereign will of the people of a state and is the

absolute rule of action with respect to all matters it addresses. 11 Am. Jur., *Constitutional Law*, § 44, p. 651. A state constitution encompasses a general attitude on the part of the people of the state toward the functioning of their state political system. *See, Note, Theory of State Constitutions*, 1966 Utah L. Rev. 542, 547.

As the fundamental or organic law of the state, a constitution enjoys a status superior to that of a state legislative enactment. In *Board v. Attorney General*, 246 Md. 417 (1967), the court stated:

> A state constitution may aptly be likened to a legislative act enacted directly by the people themselves in their sovereign capacity as a political entity (that is, by the voters, for "the original power of the people, in their aggregate political capacity, is delegated in the form of suffrage to such persons as they deem proper"), and therefore is the fundamental, extraordinary act by which the people establish the structure and mechanism of their government. [Citations omitted.] Essentially, a constitution is fundamental legislation directly by the people acting politically in their sovereign capacity, while a law is a rule of conduct prescribed by the legislative agents of the people under and subject to the delegated limitations of the previously ordained superior legislation, the Constitution. [Citations omitted.]

Id. at 394. *See, also, Swindler, State Constitutional Law: Some Representative Decisions*, 9 W. & M. L. Rev. 166, 167-68 (1967).

Despite the status of a state constitution as the supreme law of a state, the provisions of a state constitution, as with state legislative acts, are, however, subject to the limitations found in the Federal Constitution. 16 C. J. S., *Constitutional Law*, § 70, p. 131. The Federal

Constitution is, of course, the ultimate law of the land, and the obligation to guard and enforce the rights guaranteed by that Constitution rests on the state courts equally with the federal courts. *See, e. g., Smith v. O'Grady*, 312 U. S. 329 (1941). Thus, if a state constitutional provision directly conflicts with any federal constitutional guarantees, then it is invalid and must yield to the supremacy of the Federal Constitution. *See, e. g., Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132 (1909).

Although it is clear that state constitutional provisions cannot deny any rights guaranteed by the Federal Constitution, courts will not lightly strike down a state constitutional provision which has been challenged as violating the Federal Constitution. *See, e. g.*, 16 C. J. S., *Constitutional Law*, § 99 (b), p. 443 (1964); *North Carolina v. Butler*, 441 U. S. 369 (1979); *Reitman v. Mulkey*, 387 U. S. 369 (1967). The test employed by courts in adjudging the constitutionality of a state constitutional provision is somewhat more strict than the test used by courts in determining the constitutionality of legislative enactments. In order to justify a federal court in pronouncing a provision of the state constitution to be in contravention of the Federal Constitution, the impediment must be so clear as to be free from all doubt. See, *e. g., DeBerry v. City of LaGrange*, 62 Ga. App. 74, 8 S. E. 2d 146 (1940); *Sincock v. Duffy*, 215 F. Supp. 169 (D. Del. 1963), *aff'd*, 377 U. S. 695 (1964).

A provision of a state constitution is generally presumed not to be in conflict with the Federal Constitution unless the contrary is clearly shown. See, *e. g., American Federation of Labor v. Watson*, 60 F. Supp. 1010 (D. Fla.

1945). Every presumption of law and fact must be made in favor of the legality of the provisions of the state constitution. *See, e. g., State ex rel. Kemp v. City of Baton Rouge*, 215 La. 315, 40 So. 2d 477 (1949). The burden lies with the party who contests the validity of the constitutional provisions to prove the existence of the nullity to the exclusion of every reasonable hypothesis. *See, e. g., State ex rel. Kemp v. City of Baton Rouge, supra.*

Additionally, this Court has held is must accept whatever construction of a state constitution is placed upon it by the highest court of that state. *North Carolina v. Butler*, 441 U. S. 369 (1979), and that the holdings of the State Supreme Court on the purpose, scope, and operative effect of a provision of that state's constitution should be carefully considered by this Court in deciding the validity of state constitutional provisions under Fourteenth Amendment analysis. *Reitman v. Mulkey*, 387 U. S. 369 (1967).

Therefore, the issues raised in these cases must be reviewed in light of the above stated principles.

II.

The 1978 amendment of Article I, section 9, of the Constitution of Nebraska does not violate the excessive bail clause of the Eighth Amendment to the United States Constitution.

A. This Court has never specifically determined whether the excessive bail clause of the Eighth Amendment is applicable to the states through the Fourteenth Amendment; therefore the issue remains unsettled.

This Court has not specifically determined whether the prohibition against excessive bail established by the

Eighth Amendment to the Constitution of the United States is applicable to the states through the due process clause of the Fourteenth Amendment to the Constitution of the United States. While the issue therefore remains unsettled, this Court did state in *Gernstein v. Pugh*, 420 U. S. 103 (1975), that the Eighth Amendment's proscription of excessive bail has been assumed to have application to the states through the Fourteenth Amendment.

The United States Court of Appeals for the Third Circuit in *Sistrunk v. Lyons*, 646 F. 2d 64 (3d Cir. 1981), recently restated the test announced by this Court in *Duncan v. Louisiana*, 391 U. S. 145 (1968), to be applied when the question of the incorporation through the Fourteenth Amendment of a right contained in the first eight amendments to the United States Constitution arises.

Duncan, supra, articulated three inquiries to be used in such a determination. First, it must be determined whether the right belongs to those "fundamental principles of liberty and justice which lie at the base of our civil and political institutions." Second, whether the right is "basic to our system of jurisprudence," and third, whether the right is a "fundamental right essential to a fair trial."

While it is conceded for sake of argument that the literal language of the excessive bail clause contained within the Eighth Amendment is no doubt applicable to the states through the Fourteenth Amendment, it is argued that the Amendment neither contains nor creates an absolute or fundamental right to bail. The concept of an absolute right to bail in all cases is not a fundamental principle of liberty or justice which can be said to be found at the basis of our civil and political institutions nor is it

basic to our system of jurisprudence nor is it a fundamental right essential to a fair trial. Thus nothing more than the literal rights declared can be considered to be applicable to the states through the Fourteenth Amendment.

B. The Eighth Amendment does not create a right to bail. It only provides that bail shall not be excessive in those cases where it is otherwise proper to grant bail.

The Eighth Amendment provides in pertinent part that: "Excessive bail shall not be required." Despite the simplicity and clarity of the language employed, there exists two principal schools of thought concerning the scope of this amendment. The argument is made that the Eighth Amendment creates a right to bail. To the contrary, it is asserted that the Eighth Amendment prohibits excessive bail where a right to bail otherwise exists. The plain language of the amendment, its historical background, and the weight of judicial authority support the latter interpretation.

1. The plain and simple language of the excessive bail clause indicates that it merely prohibits excessive bail.

The only reference to bail in the Federal Constitution is that found in the above-quoted portion of the Eighth Amendment. The language of that clause simply and unambiguously precludes excessive bail. No mention is made therein of either an absolute or qualified right to bail.

Nevertheless, advocates of a constitutional right to bail argue that the right is a necessary implication of the

explicit prohibition against excessive bail. They reason that the purpose of the excessive bail prohibition is to prevent the practical denial of bail by setting the amount so unreasonably high that it cannot be met. This purpose could be thwarted, they argue, if Congress or state legislatures could define those circumstances in which an accused was not entitled to bail. *See, e. g., Carlson v. Landon*, 342 U. S. 524, 569 (1952) (Burton, J., dissenting).

While the above argument may have a degree of logical appeal, it initially raises an obvious objection. If the framers of the Constitution had intended to establish a right to bail, either absolute or conditional, they would have expressly provided for such. The total absence of any language in the Federal Constitution establishing a right to bail strongly evidences a lack of intent to create such a right.

2. The historical background of the excessive bail clause reveals that it was intended to prohibit only excessive bail.

A historical review of the legal development of bail reveals that the framers of the Constitution did not intend to establish therein a federal right to bail.

This Court in *Carlson v. Landon, supra*, noted that:

> The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept.

342 U. S. at 545.

It is deemed unnecessary here to indulge in a lengthy discourse of the development of bail in English Law. The concept of a prohibition against excessive bail gradually evolved from three principal documents; the Petition of Right of 1628; the Habeas Corpus Act of 1679; and the Bill of Rights of 1689.

The excessive bail prohibition is found in clause ten of the English Bill of Rights of 1689. Its purpose was to preclude judges from setting excessive bail in cases where an accused was by law bailable. An exhaustive analysis of the evolution and meaning of the excessive bail clause in English law is found in H. Meyer, *Constitutionality of Pretrial Detention*, 60 Georgetown Law Journal 1139, 1180-1190 (1972). *See, also,* Chief Justice Krivosha's analysis in *Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d 106 (1979), *cert. denied*, 444 U. S. 920, 62 L. Ed. 2d 177, 100 S. Ct. 1072 (1979).

The nature of bail in the colonies and the events surrounding the enactment of the Bill of Rights reveals that the excessive bail clause of the Eighth Amendment was intended to correspond in scope to the identical provision in English law. In an article entitled Meyer, *Constitutionality of Pretrial Detention*, 60 Georgetown Law Journal 1139, 1191-1194 (1972), the author discusses a number of the laws involving bail which were enacted by the states prior to the enactment of the Federal Bill of Rights.

Many states, either by statutory or constitutional provisions, established both a right to bail for certain offenses and a prohibition against excessive bail. *Id.* at 1191. For example, North Carolina and Pennsylvania enacted constitutional provisions which prohibited excessive bail. *Id.*

at 1191-1192. The proposals for a federal bill of rights from each of these two states only included an excessive bail clause. *Id.* at 1193.

Another persuasive indication that the framers of the Eighth Amendment did not intend to establish a constitutional right to bail is the fact that Congress enacted a statutory right to bail in noncapital cases in the Federal Judiciary Act of 1789. *Id.* at 1194, 1455. If the Eighth Amendment was intended to grant a right to bail, its authors could not have missed the glaring inconsistency between its scope and that of the Judiciary Act of 1789. If the Eighth Amendment was intended to guarantee a right to bail, as it provides for no exceptions, the act of 1789 would have been inconsistent, since it exempted capital offenses. *Id.* at 1455.

The enactment of the Judiciary Act of 1789 in conjunction with the virtually simultaneous enactment of the Eighth Amendment indicates a conviction that an inflexible constitutional regulation of a right to bail was not desirable. Whether a particular offense should be bailable was deemed a determination more appropriately left to legislative enactment which could be more easily revised with changing circumstances and attitudes. *Id.* at 1194.

The meaning of the excessive bail clause in English law; the different treatment afforded right to bail provisions and excessive bail provisions under colonial and state law; and the federal statutory right to bail provisions contained in the Judiciary Act of 1789, all establish that the framers of the Eighth Amendment did not intend to create a federal constitutional right to bail.

A historical analysis of the excessive bail clause reveals that the framers of the Eighth Amendment intended

to do exactly what they accomplished, which is to constitutionally preclude the imposition of excessive bail in those cases where an accused has otherwise been granted a right to bail. The cases which have considered this issue are generally in accord.

3. Judicial interpretations of the excessive bail clause have held that since it only prohibits excessive bail, Congress and the states are free to define those offenses which are of a nature as to which bail may be denied, so long as the determination is reasonable.

In reviewing judicial interpretations of the Eighth Amendment, it is necessary to distinguish between cases which address the issue of whether a particular accused was required to post an excessive bail bond and cases which involve the question of whether an offense may be properly classified as nonbailable. The case at bar involves the latter issue.

The appellee's argument relies in large part on dicta from *Stack v. Boyle*, 342 U. S. 1 (1951). The petitioner therein was accused of a federal criminal offense which, under applicable statutes, was classified as bailable. Bail had been fixed in the amount of $50,000. The issue therefore was whether, based on the particular facts involved, that amount of bail was excessive under the Eighth Amendment. The court ordered the district court to reconsider a motion to reduce bail because of procedural defects. The appellee's reliance on this case is obviously misplaced.

The only decision of this Court involving the constitutionality of a statute authorizing the denial of bail is *Carlson v. Landon*, 342 U. S. 524 (1952). This case in-

volved active alien communists who were detained without bail pending deportment proceedings, pursuant to section 23 of the Internal Security Act. Said provision granted the Attorney General the discretion to detain aliens without bail. The exercise of this discretion was based on reasonable grounds to believe that the petitioners' release would be prejudicial to the public interest. This Court held that Congress constitutionally may provide for denial of bail for persons arrested pursuant to federal law. In so holding this Court stated:

> The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed the very language of the amendment fails to say all arrests must be bailable. We think clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases.

342 U. S. at 545-546.

Chief Justice Vinson, author of the opinion in *Stack, supra,* joined in the Court's opinion in *Carlson, supra.* This fact further indicates that reliance on *Stack, supra,* to support a constitutional right to bail argument is misplaced.

While it may be argued that *Carlson, supra,* is distinguishable from the case at bar since it involved the power of Congress to regulate aliens, numerous cases have considered whether state law which authorizes the denial of bail for certain offenses is unconstitutional. The courts considering the issue have uniformly upheld the power of states to deny bail for certain offenses, so long as that power is exercised reasonably.

In *Sistrunk v. Lyons*, 646 F. 2d 64 (3d Cir. 1981), the United States Court of Appeals for the Third Circuit recently observed "Of course, the Eighth Amendment does not create an absolute right to be free on bail." *Supra*, at 68. Additionally the court there observed:

> Unlike most guarantees in the Bill of Rights, it is not the naked right to bail with which we deal, rather it is the right to be free from excessive bail. While federal law is determinative on the issue of "excessiveness," federal bail statutes would appear to provide only guidance on the exact contours of the right to bail. States remain free within constitutional bounds to define the range of offenses for which bail is discretionary. Because the Eighth Amendment does not delimit the denial of bail to capital cases, Congress as well as the states could provide that other serious non-capital crimes are similarly not entitled to bail.

Sistrunk, supra, at 70. Finally the court observed:

> [T]he Constitution does not provide a right to bail per se to which the states must conform, it only sets a ceiling on its employment.

Sistrunk, supra, at 71.

In *United States v. Edwards*, D. C. Ct. App. (en banc), the District of Columbia Court of Appeals considered the constitutionality of the District of Columbia's preventive detention law. While at this writing the appellant has been unable to obtain a reported version of this case, the court is reported to have held:

> The history of the Eighth Amendment, however, is generally unilluminating and falls short of supporting, let alone compelling the conclusion that a right to bail must be found by implication. An examination of the history of the English bail indicates that the excessive bail clause was developed as a specific

> remedy for judicial abuse of the bail procedure as otherwise established by law, and did not, in and of itself, imply any right to bail.

29 Crim. Law Rptr. 2193.

The court is also reported to have held that a fundamental right to bail was not universal among the colonies or the early states given the fact that several of the original states made the right to bail a statutory rather than constitutional right and many early state constitutions specifically granted a right to bail while also providing for an excessive bail clause suggesting a recognition of the distinction between the two.

The District of Columbia Court of Appeals ultimately upheld the constitutionality of the preventive detention law, concluding that neither the history of the Eighth Amendment's excessive bail clause nor the historical evidence nor contemporary fundamental values implicit in the criminal justice system require recognition of the right to bail as a basic human right.

In spite of its holding below, the United States Court of Appeals for the Eighth Circuit in *Mastrian v. Hedman*, 326 F. 2d 708 (8th Cir. 1964), *cert. denied*, 376 U. S. 965 (1964) previously held:

> Neither the Eighth Amendment nor the Fourteenth Amendment requires that everyone charged with a state offense must be given his liberty on bail pending trial. . . . Traditionally and acceptedly, there are offenses of a nature as to which a state properly may refuse to make provision for a right to bail.

Id. at 710.

In *Turco v. State of Maryland*, 324 F. Supp. 61 (D. Md. 1971), *aff'd*, 444 F. 2d 56 (4th Cir. 1971), the peti-

tioner was denied bail under a court rule which authorized the court to exercise discretion in allowing bail in capital cases. The petitioner alleged a violation of the Eighth Amendment. In rejecting his contention, the court stated:

> It should be noted that the Eighth Amendment has never been considered to prevent Congress from classifying criminal cases into those in which an accused is entitled to bail as a matter of right and those in which the allowance of bail is a discretionary matter. [Citations omitted.]
>
> If the federal government is not proscribed by the Eighth Amendment from denying bail in certain types of cases, neither is the State of Maryland prohibited from following a rule classifying types of criminal cases into those in which bail is allowed as a matter of discretion. *Mastrian v. Hedman, supra; Dameron v. Harson*, 255 F. Supp. 533 (W. D. La. 1966), *aff'd*, 364 F. 2d 991 (5th Cir. 1966).

Id. at 63-64.

In *United States ex rel. Covington v. Coparo*, 297 F. Supp. 203 (S. D. N. Y. 1969), the petitioner, who was charged with first degree murder, was denied bail under a New York statute which leaves admission to bail in felony cases to the discretion of the court. First degree murder was not a capital offense in New York. The petitioner alleged that his denial of bail in a noncapital offense constituted a violation of the Eighth Amendment. The court rejected his contention and stated:

> Petitioner assumes that the Eighth Amendment, binding upon the State of New York under the Fourteenth Amendment, requires that bail be granted as a matter of right in all except capital crimes. The Eighth Amendment, however, does not mention, much less distinguish between, capital and other felonies.

> It provides only that "excessive bail shall not be required. . . ." It is true, as petitioner contends, that some courts have construed the Eighth Amendment to guarantee the right to bail in all but capital cases, but such statements must be considered in the context of the Congressional statute governing bail, rather than as a command under the Eighth Amendment.

Id. at 205. The court further noted:

> And as Congress is free, within constitutional limits, to define the classes of crimes which are bailable as a matter of right and those that are not, so, too, may the state legislatures. While the Supreme Court has not passed upon the direct issue, those federal courts which have are in accord that the Eighth and Fourteenth Amendments do not require the state to grant bail in all cases as a matter of right; all have recognized that a state may constitutionally provide that bail be granted in some cases as a matter of right and denied in others, provided that the power is exercised rationally, reasonably and without discrimination. Thus, it is left to the courts to fix the amount of bail in all cases where it is a matter of right and also in those instances where the court exercises its discretion favorably but, under the Eighth Amendment where bail is fixed in either instance, it must not be excessive, and further, when bail is not a matter of right, the court may not arbitrarily or unreasonably deny bail.

Id. at 206.

The analysis of *Covington,* supra, is particularly instructive as the appellee in the case at bar appears to argue that the Eighth Amendment specifically grants a right to bail in noncapital cases. There are numerous problems with the argument that the Eighth Amendment provides for some sort of capital v. noncapital offense distinction. Obviously the language of the amendment does not so provide.

Further, when the Eighth Amendment was enacted virtually all felonies were capital offenses. *See,* J. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention,* 55 Va. L. Rev. 1223 (1967). As stated therein:

> The considerations which have led to the gradual repeal of the death penalty—primarily rehabilitative efforts in corrections, doubts concerning the deterrent effect of capital punishment and a felt disproportion between the punishment and the crime—are largely irrelevant to the question whether a defendant should be detained pending trial. Whatever the merits of these considerations with respect to the death penalty, they have little bearing on human propensities for dangerous conduct during the period between arrest and trial. As a class, persons held to answer for such dangerous offenses are robbery, rape or burglary if released pending trial pose as great a danger to the community today as they did in 1791. Accordingly, since the eighth amendment when adopted clearly permitted pretrial detention for capital crimes because of danger to the community, it should not today prohibit pretrial detention for such dangerous crimes merely because they are no longer capital for reasons completely unrelated to their dangerousness.

Id. at 1230.

The experience of Virginia is illustrative and of particular interest since many of the persons instrumental in the formulation of the Federal Constitution were from that state. Virginia has an excessive bail provision in its constitution; however, the right to bail has always been statutory. The first statutory enactment in 1785, provided a right to bail except in cases where the crime was punishable in life or limb and there was good cause to believe the accused was guilty. In 1796, Virginia revised its penal

code to reduce the number of offenses punishable by death. However, in 1801, Virginia revised its statutory right to bail provision so that bail could be denied in all cases in which it could have been denied prior to the revision of its penal code. Meyer, *Constitutionality of Pretrial Detention*, 60 Georgetown Law Journal 1139, 1193-94 (1972). There clearly is no constitutional requirement of a nexus between the capital or noncapital nature of the offense and whether or not it is bailable.

The court in *Covington, supra,* noted that the recent "enlightened" decision of New York to eliminate the death penalty in cases of first degree murder cannot automatically mean that a right to bail now exists. The penalty is only one factor to consider in determining whether bail is a matter of right. More importantly is the seriousness of the charge. The court held that the state court could reasonably have determined there was a substantial risk that the defendant, if released on bail would not appear for trial and that his release might constitute a danger to the community.

Based on the language of the excessive bail clause of the Eighth Amendment, its historial development and judicial interpretations, it is clear that there is no absolute right to bail. The states are free to define the offenses which are bailable as of right and those that are not. There is no constitutional requirement that such determination be made on the basis of whether or not the penalty is capital. The ultimate issue is whether that determination is reasonable.

III.

The 1978 bail amendment to Article I, section 9, of the Constitution of Nebraska does not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The equal protection clause of the Fourteenth Amendment to the United States Constitution provides that states are forbidden to deny to any person within their jurisdiction the equal protection of the laws. The guiding principle of the constitutional guarantee of equal protection of the laws is that all persons shall be treated alike under like circumstances and conditions.

This Court has basically adopted two tests for determining whether or not a state law creating a classification violates the equal protection clause. Under the "strict scrutiny" or "compelling interest" test the classification created by state law must be necessary to promote some compelling state interest. The "minimum scrutiny" or "conceivable basis" test basically provides that a classification is valid if there is any conceivable basis upon which the classification could relate to any legitimate governmental interest. The test employed in any particular circumstance depends upon whether the classification created by the state law involves any "fundamental right"[1] or

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1 This Court has held the following to be "fundamental rights": (1) Interstate Travel, *Shapiro v. Thompson*, 394 U. S. 618 (1969); (2) Privacy, *Griswold v. Connecticut*, 381 U. S. 479 (1965); (3) Voting, *Baker v. Carr*, 369 U. S. 186 (1962); (4) Speech, *Terminiello v. Chicago*, 337 U. S. 1 (1949); (5) Religion, *Prince v. Massachusetts*, 321 U. S. 158 (1944); (6) All First Amendment Rights.

"suspect"[2] traits. If the classification affects the exercise of any "fundamental right" or is based on any "suspect" criteria, then courts will use the more stringent "strict scrutiny" test in analyzing the constitutionality of the classification. However, when the classification involves neither of the above two factors, courts will apply the less stringent "minimal scrutiny" or "conceivable basis" test.[3]

A. There is no "fundamental right" to bail.

It was argued below that the "strict scrutiny" test should be applied in analyzing whether or not Article I, Section 9, of the Constitution of Nebraska violates the equal protection clause. The essential contention is that there is a "fundamental right" to bail, thus, allowing the application of the "strict scrutiny" test. However, the appellant submits that Article I, Section 9, of the Nebraska Constitution does not affect any "fundamental right" secured by the Federal Constitution.

As discussed *supra*, there are offenses of a nature as to which Congress or a state properly may refuse to make any provision for a right to bail, provided the power to classify such offenses is exercised reasonably. *See, e. g., Mastrian v. Hedman, supra; Wansley v. Wilkerson*, 263 F. Supp. 54 (W. D. Va. 1967); and *United States ex rel. Covington v. Coparo*, 297 F. Supp. 203 (S. D. N. Y. 1969).

In addition, it has been held and as is argued herein that there exists no federal constitutional right to bail.

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2 This Court has held that classifications are "suspect" if they are based on race, national origin or alienage.

3 In cases involving gender based classification this Court has applied a "middle tier" analysis. *Orr v. Orr*, 440 U. S. 268 (1979).

See, e. g., State v. Garrett, 493 P. 2d 1232 (Ariz. 1972); *Mastrian v. Hedman, supra*; *Sistrunk v. Lyons, supra.*

The guarantee against excessive bail provided by the Eighth Amendment applies only when Congress or states have deemed that a particular offense is bailable. Therefore, since there is no "fundamental right" affected by Article I, Section 9, of the Nebraska Constitution, and the Eighth Amendment's proscription against excessive bail is not applicable to offenses which a state deems not subject to bail, then this Court should adhere to the traditional equal protection test of "minimum scrutiny."

B. The differing treatment of sexual offenders apart from other criminal offenders adopted in the 1978 bail amendment is reasonable in that it is relevant to the legitimate state purpose of protecting society.

The test under the Fourteenth Amendment is whether the classification bears some rational relationship to the legitimate purpose of the legislation. In *Dandridge v. Williams*, 397 U. S. 471 (1970), this Court stated:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

The equal protection clause does not require that a state must choose between attacking every aspect of a problem or not attack the problem at all. A state's action must only be rationally based and free from invidious

discrimination. *Dandrige v. Williams, supra; San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973); *McGowan v. Maryland,* 366 U.S. 420 (1961).

The equal protection clause does not require that all persons be dealt with identically but it does require that the distinction made have some relevance to the purpose for which the classification is made. *Baxstrom v. Herold,* 383 U.S. 107 (1966). The question becomes whether the distinctions made are reasonable in that they are relevant to the purpose of the initial classification.

In determining whether or not a particular classification is reasonable in that it is relevant to the purpose of the classification, courts must consider the classification from the standpoint of the Legislature and the people in enacting it. This Court has held, in passing on the constitutionality of state legislation, that it is not concerned with the wisdom of or the need for such legislation. *See, Queenside Hills Realty Co. v. Saxl,* 328 U.S. 80 (1946). It is enough that it is open to the people of the state to believe the legislation and the distinctions drawn therein are valid as the basis of a policy for the people. *See, e.g., Safeway Stores, Inc. v. Oklahoma Retail Grocers Association,* 360 U.S. 334 (1959).

The 1978 bail amendment enacted by the people of the State of Nebraska applies only to those persons charged with first degree sexual assault. Neb. Rev. Stat. § 28-319 (Reissue 1979). The penal sanction ascribed to this offense is a Class II felony. Neb. Rev. Stat. § 28-105 (Reissue 1979). It provides that a person convicted of a Class II felony may be sentenced to a maximum of fifty years imprisonment with a minimum of one year.

The basic question presented is whether the differing treatment of sexual offenders apart from other criminal offenders adopted in Article I, Section 9, of the Constitution of Nebraska is a reasonable one. In resolving this question, it should be kept in mind that there exists no federal constitutional right to bail. Equally important to this determination is the right of the individual states to freely determine which types of criminal offenses are to be made subject to bail.

Th effect of the 1978 bail amendment to Article I, Section 9, of the Nebraska Constitution is to add to those offenses which are nonbailable sexual offenses involving penetration by force or against the will of the victims, where the proof is evident or the presumption great. The purpose of this amendment, according to its proponents, is the protection of society from repetition of these types of heinous crimes. It was the belief of the proponents that sexual offenders are prone to repeat sex offenses and therefore should not be granted a specific right to bail pending the resolution of the charges made against them. In overwhelmingly adopting the 1978 bail amendment, the people of the State of Nebraska affirmed the above belief that in such cases bail poses a significant danger and threat.

The people of the State of Nebraska have made a constitutionally legitimate determination that these particular sexual offenders in these specific circumstances constituted a distinct class of criminals and that members of this class should not be entitled as a matter of state constitutional right to bail. They have determined that the crime of rape where the proof is evident or the presump-

tion great is of such an inherent gravity as to preclude the admission to bail. In *Coker v. Georgia*, 433 U. S. 584 (1977), this Court commented on the crime of rape:

> It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. *Short of homicide, it is the "ultimate violation of self."* It is also a violent crime because it normally involves force, or the threat of force, or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. *Because it undermines the community's sense of security, there is public injury as well.*

(Emphasis added.) 433 U. S. at 597-98.

Historically, bail has been denied when it was feared the severity of the punishment, *i. e.*, capital punishment, would jeopardize the likelihood that the accused would reappear for trial if released on bond. This case presents the question of whether a state may constitutionally deny a right to bail where it has determined that the particular class of accused persons would present a serious threat to the safety of the community if released.

While this question appears to have never been squarely addressed by this Court, the valid interests of the community's welfare were at least recognized by this Court in *Carlson v. Landon, supra,* and by Mr. Justice Douglas in an opinion in chambers in *Carbo v. United States*, 7 L. Ed. 2d 769 (1962), wherein he observed:

> One convicted of rape or murder is not necessarily turned loose on bail pending review even though

substantial questions were presented in the appeal. If, for example, the safety of the community would be jeopardized, it would be irresponsible judicial action to grant bail. As stated in United States ex rel. Estabrook v. Otis (CA8 Mo) 18 F. 2d 689, 690, "Bail should not be granted where the offense of which the defendant has been convicted is an atrocious one, and there is danger that if he is given his freedom he will commit another of like character."

A state's ability to deny bail on the basis that a community might be threatened was also recognized by Mr. Justice Douglas in an opinion in chambers in *Rehman v. California*, 13 L. Ed. 2d 17 (1964), and by Mr. Chief Justice Warren in an opinion in chambers in *Leigh v. United States*, 8 L. Ed. 2d 269 (1962). *See, also, Wansley v. Wilkerson*, 263 F. Supp. 54 (W. D. Va. 1967), and *United States v. Coparo*, 297 F. Supp. 203 (S. D. N. Y. 1969).

The Eighth Circuit below found no constitutional distinction between excessively high bail and no bail at all and held that the Eighth Amendment created a fundamental right to release on bail. In viewing Nebraska's constitutional provision against the standard of this fundamental right, they held, "The fatal flaw in the Nebraska constitutional amendment is that the state has created an irrebuttable presumption that every individual charged with this particular offense is incapable of assuring his appearance by conditioning it upon reasonable bail or is too dangerous to be granted release." The appellant takes issue with this observation. First, Nebraska's state constitutional right to bail is not denied every person charged with sexual assault but, rather, only to those who are so charged where the proof is evident or the presumption great. Secondly, while it is true that such an individual

is denied a constitutional right to bail, nothing prohibits a judge from granting bail.

If the Eighth Circuit below was analyzing Nebraska's constitutional provision in a substantive due process context, the appellant would suggest that the test for such analysis is whether or not the constitutional provision is unreasonable, arbitrary, or capricious and whether the means selected by the people of Nebraska have a real and substantial relation to the objectives sought to be achieved. *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937). The appellant would conclude that the State of Nebraska has met such a test.

Article I, Section 9, of the Constitution of the State of Nebraska does not create an irrebuttable presumption that all persons charged with sexual offenses involving force pose a significant danger but merely denies them the constitutional right to demand bail, the state judge being given the discretion to determine whether the proof is evident or the presumption great or to grant bail even if he so finds. Article I, Section 9, denies a person so accused a constitutional right to bail; it does not prohibit his release.

The determination of which offenses shall be bailable is a question for the people to decide. The only limitation upon the right is that the determination is reasonable and based on distinctions relevant to the purpose of the differing treatment.

The appellant submits that the people of the State of Nebraska have reasonably determined that the crime of first degree sexual assault is distinct from other crimes,

and, therefore, that the welfare of society demands that persons charged with this crime where the proof of their guilt is evident or the presumption of their guilt great not be afforded a constitutional right to bail. The above distinction is based on the undisputed fact that rape is of such a heinous nature as to pose a grave threat to society. Thus, the differing treatment between this distinct, specific, and narrow class of rapists and other criminal offenders is justified in that it is relevant to the legitimate state purpose of protecting society.

IV.

The 1978 bail amendment to Article I, section 9, of the Constitution of Nebraska does not violate any other constitutionally protected rights.

A. Nebraska's 1978 bail amendment does not violate the presumption of innocence.

The claim was made below that the 1978 bail amendment to Article I, Section 9, of the Nebraska Constitution abridged the presumption of innocence included in the Fourteenth Amendment's guarantee of due process. This argument is primarily based on dicta contained in *Stack v. Boyle, supra,* and *In re Winship,* 397 U. S. 358 (1970). For the reasons set forth below, the appellant submits that this argument is without merit.

Initially, it must be pointed out that bail has always been denied in certain cases, especially capital cases, and this has never been held to violate due process of law or any presumption of innocence. This is because the Federal Constitution clearly sanctions pretrial arrest and detention by permitting arrests on probable cause. In addi-

tion, the term "due process of law" as used in the Federal Constitution does not guarantee any specific type of procedure. It merely provides that a party is entitled in any given case to the regular procedure provided for by the law applicable to that case. Thus, the presumption of innocence, whatever it means, would become part of due process only where the applicable law extends it to a person as part of the law. *See,* Meyer, *Constitutionality of Pretrial Detention,* 60 Georgetown Law Journal 1381, 1438-49 (1972).

It is difficult to precisely define the term "presumption of innocence." In *McCormick on Evidence* (2d Ed. 1972), the authors state:

> The phrase is probably better called the "assumption of innocence" in that it describes our assumption that, in the absence of contrary facts, it is to be assumed that any person's conduct upon a given occasion was lawful. In criminal cases, the "presumption of innocence" has been adopted by judges as a convenient introduction to the statement of the burdens upon the prosecution, first of producing evidence of the guilt of the accused and, second, of finally persuading the jury or judge of his guilt beyond a reasonable doubt.

Id. at 805-06. As the above quoted passage indicates, the "presumption of innocence" primarily serves the purpose of impressing on the judge or jury that any doubts as to a defendant's guilt must be resolved in favor of the accused and that the burden of proving guilt is on the prosecution. *See, e. g., Washington v. Clemmer,* 339 F. 2d 725 (D. C. Cir. 1964); *Hairston v. United States,* 343 F. 2d 702 (D. C. Cir. 1965). *Also, see, Robertson v. United States,* 364 F. 2d 702 (D. C. Cir. 1966); *Deutch v. United States,* 367 U. S.

456 (1961); *Sinclair v. United States*, 279 U. S. 263 (1929); and *United States v. Fleischman*, 339 U. S. 349 (1950).

The "presumption of innocence" has never been specifically held by this Court to be secured by the due process clause of the Fourteenth Amendment. However, it is definitely questionable that the "presumption of innocence," as the underlying principle for the reasonable doubt standard, is protected by the due process clause.

In *In re Winship*, 397 U. S. 358 (1970), this Court held that the due process clause of the Fourteenth Amendment protected an accused in a criminal prosecution against conviction except upon proof beyond a reasonable doubt. This Court did not specifically hold that the principle of "presumption of innocence" was protected by the due process clause of the Fourteenth Amendment, but did indicate that the reasonable doubt standard provided substance for the concept of "presumption of innocence." As pointed out above, this is one of the purposes of the "presumption of innocence." Even if the principle of "presumption of innocence" is protected by the due process clause, it is difficult to determine how the adoption of the 1978 bail amendment violates or conflicts, in any way, with the purpose of a "presumption of innocence."

Apparently, the appellee relies on dicta in *Stack v. Boyle, supra*, to make this nexus. In *Stack v. Boyle, supra*, the sole question before this Court was whether statutory standards provided by federal law for setting bail in noncapital offenses were properly applied. *Stack v. Boyle, supra*, on its own terms, only applies where a person has been admitted to bail by law.

As demonstrated above, the "presumption of innocence" is in actuality not a real presumption. It has been consistently interpreted to mean nothing more than that it is for the prosecution to adduce evidence and produce persuasion beyond a reasonable doubt. Thus, even if the "presumption of innocence" is protected by the due process clause, the 1978 bail amendment adopted by the people of the State of Nebraska in no way conflicts with or violates that principle. The purpose of the 1978 bail amendment is to make nonbailable those persons charged with a sexual offense involving penetration by force, where the court finds that the proof is evident or the presumption is great, in order to protect society from further similar activity pending trial. The appellant submits that this legitimate purpose in no way conflicts with or violates the purpose of the "presumption of innocence" which is to instill in the minds of the court and the jury that the burden is on the prosecution at trial to prove, beyond a reasonable doubt, that the accused is guilty.

B. Nebraska's 1978 bail amendment does not violate the right to effective assistance of counsel.

It was asserted below that the 1978 bail amendment violates the rights of an accused to effective assistance of counsel and to freedom to prepare a defense under the Sixth and Fourteenth Amendments. The apparent logic of this contention is that an accused, who is incarcerated because he has been charged with a nonbailable offense, will not be able to effectively consult with his attorney in the preparation and investigation of his case, thus rendering any subsequent criminal conviction invalid because of inadequate investigation and preparation by counsel.

The premise upon which the above argument is based is that an accused has a constitutional right to be free from custody after being charged with a crime in order to assist in the preparation of his defense. This premise is totally fallacious and finds absolutely no support in either the Sixth or the Fourteenth Amendments.

An accused is guaranteed, as part of his right to effective assistance of counsel, that he be allowed to consult with his attorney and that his attorney be given adequate time and opportunity to prepare his defense. *See, e. g., United States v. Wheeler,* 434 F. 2d 1195 (9th Cir. 1970); *Stamps v. United States,* 387 F. 2d 993 (8th Cir. 1967); and *DeRoche v. United States,* 337 F. 2d 606 (9th Cir. 1964). The corollary of the above is that if an accused, who is being detained in custody, has competent counsel who has adequate time to prepare his defense, then the Sixth Amendment requirements are satisfied and there is no violation of due process. *See, e. g., United States ex rel. Hyde v. McMann,* 263 F. 2d 940 (2d Cir. 1959); and *Wansley v. Wilkerson,* 263 F. Supp. 54 (W. D. Va. 1967). Whether or not an accused is being detained on a nonbailable offense is irrelevant to the factors involved in determining whether the accused has been granted effective assistance of counsel.

The logical extension of the appellee's reasoning would be to render unconstitutional, as a violation of the right to effective assistance of counsel, all pretrial detentions, including those situations where a reasonable bail has been fixed which the accused is unable to meet. Obviously, this is an untenable result.

C. Nebraska's 1978 bail amendment does not violate the cruel and unusual punishment clause of the Eighth Amendment.

It was further asserted below that the 1978 bail amendment to the Nebraska Constitution violates the cruel and unusual punishment clause of the Eighth Amendment. The argument advanced in support of this contention was that the 1978 bail amendment punishes the status of being a person charged with a particular criminal offense by denying bail to all persons charged with that offense. The above argument presupposes that the denial of pretrial release and subsequent pretrial detention constitutes some form of punishment. This is clearly not true. As previously mentioned, pretrial detention has traditionally been sanctioned.

In order to invoke the protection of the cruel and unusual punishment clause of the Eighth Amendment, there must be a determination made that punishment has been imposed. In *Ingraham v. Wright*, 430 U. S. 651 (1977), this Court stated that the cruel and unusual punishment clause circumscribes the criminal process in three ways:

> [F]irst, it limits the kinds of punishment that can be imposed on those convicted of crimes, . . . second, it proscribes punishment, grossly disproportionate to the severity of the crime, . . . and third, it imposes substantive limits on what can be made criminal and punished as such.

Id. at 667. As the above quote indicates, the cruel and unusual punishment clause limits the *kinds* of punishment that can be imposed *after conviction.*

Prior to conviction, punishment is absolutely forbidden. *See, Jones v. Wittenberg*, 323 F. Supp. 93 (N. D.

Ohio 1971). In cases where a person is being detained either because he cannot afford the fee for bail bond set or because the accused has been charged with a nonbailable offense, the detainees are presumed to be innocent. The actual determination of their guilt or innocence remains for future determination. In *Hamilton v. Love*, 328 F. Supp. 1182 (E. D. Ark. 1971), in discussing whether or not the cruel and unusual punishment clause was applicable to allegations raised by persons detained in county jail pending trial, the court stated:

> The inmates of the Puloski County Jail should not be referred to as "convicts" or even "prisoners," considering the usual connotations of such terms. Furthermore, it is not really appropriate to judge the constitutionality of their incarceration by referring to the "cruel and unusual punishment" provisions of the Eighth Amendment. Having been convicted of no crime, the detainees should not have to suffer *any* "punishment," as such whether "cruel and unusual" or not.

Id. at 1191.

In conclusion, as the above authorities indicate, it is not "punishment" to be detained prior to trial. Thus, the 1978 bail amendment does not violate the cruel and unusual punishment clause of the Eighth Amendment.

CONCLUSION

The constitution of a state represents the direct and basic expression of the sovereign will of the people of that state. In order for a provision of a state constitution to be found in contravention of the Federal Constitu-

tion, it must be clearly and conclusively shown that a violation exists. The appellant respectfully submits that this burden has not been met in this case.

The excessive bail clause of the Eighth Amendment to the United States Constitution does not create a fundamental right to bail. It merely provides that excessive bail should not be required where bail is otherwise proper. Whether a particular criminal offense is bailable or nonbailable is for the Congress and the various states to decide. The weight of authority recognizes that states are free to determine which criminal offenses are to be made bailable, so long as that power to classify is not exercised in an unreasonable or arbitrary manner. The determination by the people of the State of Nebraska that persons charged with certain sexual offenses should not be granted a constitutional right to bail is clearly reasonable in light of the inherent gravity of the crime of rape and the legitimate state purpose of the protection of its citizens.

The people of the State of Nebraska have not created an impermissible irrebuttable presumption inasmuch as the state judge has the discretion to find that the proof of the guilt of persons charged with sexual offenses involving force is not evident or that the presumption of their guilt is not great. Additionally, the state has not prohibited bail being set for persons in this class but merely has declined to affirmatively grant such persons a state constitutional right to bail.

The various states and the federal government have historically been permitted, under the United States Constitution, to deny bail when it was found that to do so would lessen the likelihood that the accused would re-

appear for trial and it is concluded that it is equally constitutionally acceptable to deny bail where, as here, it is feared that the release of an individual charged with serious sexual offenses will pose a substantial threat to the safety of the citizens of the state.

It is also concluded that Article I, Section 9, of the Constitution of the State of Nebraska does not violate either the presumption of innocence if, in fact, such presumption is even applicable to pretrial incarceration nor does it violate an accused's right to the effective assistance of counsel nor can it be said that it constitutes cruel and unusual punishment.

Therefore, for the reasons set out above and the arguments made herein, the appellant respectfully concludes that the decision of the United States Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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